No. 06-1322

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In the Supreme Court of the United States

FEDERAL EXPRESS CORPORATION,
Petitioner,

v.

PAUL HOLOWECKI, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONER'S BRIEF ON THE MERITS

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QUESTION PRESENTED

Whether the Second Circuit erred in concluding that the prerequisites to suit in § 626(d) of the Age Discrimination in Employment Act of 1967 ("ADEA") were satisfied by the submission of an "intake questionnaire" to the Equal Employment Opportunity Commission ("EEOC"), where the EEOC did not treat the form as a charge by providing notice to the employer or attempting voluntary conciliation, and in the absence of any evidence that the employee submitting the questionnaire reasonably believed it would be treated as a charge.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The following list identifies all of the parties appearing here and before the United States Court of Appeals for the Second Circuit. The Petitioner here and defendant-appellee below is Federal Express Corporation (d/b/a/ FedEx Express) ("FedEx"). The Respondents here, who were also plaintiffs-appellants below, are Paul Holowecki, Patricia Kennedy, Donna M. Lewis, Charles Moncalieri, Phyllis Nelson, Steven Almendarez, Kelly J. Martinez, Kevin McQuillan, Kenneth G. Mutchler, George Robertson, and Nancy Trompics.[1] Additional plaintiffs-appellants below, who have been voluntarily dismissed from the case and therefore are not Respondents here, are Andy Kubicki, Frank J. Martinez, and Elizabeth Tucker. By virtue of the allegations of their Complaint in the District Court, the Respondents seek to represent a putative class of persons similarly situated, but no motion for class certification has yet been filed and no class has been certified. *See* SUP. CT. R. 24.1(b).

The corporate disclosure statement contained in the Petition for Writ of Certiorari, Pet. iii, remains accurate. *See* SUP. CT. R. 24.1(b), 29.6.

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[1] Respondent Nancy Trompics was incorrectly identified in the complaint as Nancy Thompics. Although the district court amended the caption of the case to reflect the correct name, *see* Pet. App. 32a at n.1, the incorrect spelling has continued to appear at times in this case.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit, Pet. App. 3a–23a, is reported at 440 F.3d 558. The unpublished memorandum and order of the United States District Court for the Southern District of New York, Pet. App. 31a–42a, is unofficially reported at 2002 WL 31260266 and 2002 U.S. Dist. LEXIS 19100.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Second Circuit issued its opinion on March 8, 2006, Pet. App. 3a, and entered its order denying rehearing and rehearing en banc on October 31, 2006, Pet. App. 1a. On January 19, 2007, FedEx applied to extend the time to file a petition for certiorari. Justice Ginsburg granted that application on January 23, 2007, extending the time to file to March 30, 2007. FedEx timely filed its petition on March 30. This Court granted the petition on June 4, 2007. 127 S. Ct. 2914. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves provisions of the Age Discrimination in Employment Act of 1967, 81 Stat. 602, as amended, 29 U.S.C. § 621 *et seq.* The most pertinent provision of the ADEA, 29 U.S.C. § 626(d), provides:

> No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed—

> (1) within 180 days after the alleged unlawful practice occurred; or
> (2) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.
>
> Upon receiving such a charge, the Commission shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

Other relevant provisions of the ADEA are reproduced at Joint Appendix ("JA") 344–50.

STATEMENT OF THE CASE

I. STATUTORY AND REGULATORY BACKGROUND.

The ADEA makes it unlawful for an employer to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1). It permits an individual who has been discriminated against in violation of the ADEA to bring a civil action, *id.* § 626(c)(1), but only if a number of prerequisites are met first, *id.* § 626(d). A "charge alleging unlawful discrimination" must be filed within either 180 or 300 days after the alleged discrimination occurred, depending on the jurisdiction; the charging party must wait 60 days after filing the charge; and the EEOC must promptly notify the persons

named in the charge as potential defendants and seek voluntary resolution of the claims. *Id.* § 626(d).

Because the filing of a charge is mandatory under § 626(d), a plaintiff is barred from bringing an ADEA suit where no charge alleging age discrimination has been filed. *See, e.g., Mehr v. Starwood Hotels & Resorts Worldwide, Inc.*, 72 Fed. Appx. 276, 286 (6th Cir. 2003) ("The filing of a discrimination charge with the EEOC is a jurisdictional prerequisite to bringing a civil action [under the ADEA].") (citing *Davis v. Sodexho Cumberland Coll. Cafeteria*, 157 F.3d 460, 463 (6th Cir. 1998)). The relevant time periods for filing a charge are likewise mandatory, and a plaintiff is barred from bringing an ADEA suit where her charge alleging age discrimination was filed untimely. *See, e.g., Dorsey v. Pinnacle Automation Co.*, 278 F.3d 830, 835 (8th Cir. 2002) (affirming dismissal of ADEA claims as time-barred because charge was not filed within 300 days of alleged discrimination).

The EEOC's statutory duties under § 626(d) are equally mandatory. Just as the charge alleging unlawful discrimination must be filed within either 180 or 300 days, the EEOC must promptly provide notice of the allegations of discrimination to the employer and initiate efforts at resolving the dispute informally. *Compare* 29 U.S.C. § 626(d) ("Such a charge *shall* be filed" within either 180 or 300 days) (emphasis added) *with id.* ("The Commission *shall* promptly notify all persons named in such charge as prospective defendants in the action and *shall* promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.") (emphasis added).

The EEOC has established interpreting regulations specifying both the form and the content needed to allege

unlawful discrimination. 29 C.F.R. §§ 1626.6, 1626.8. Other EEOC regulations reflect the statute's requirement that the EEOC provide prompt notice to the employer and promptly initiate conciliation efforts upon receiving a charge. *See id.* § 1626.11 ("Upon receipt of a charge, the Commission shall promptly notify the respondent that a charge has been filed."); *id.* § 1626.12 ("Upon receipt of a charge, the Commission shall promptly attempt to eliminate any alleged unlawful practice by informal methods of conciliation, conference and persuasion.").

The EEOC has promulgated a form, EEOC Form 5, on which to take ADEA charges. 1 EEOC Compliance Manual § 2.5(a), Drafting the Charge/Complaint (Oct. 2002) ("Use Form 5 to take Title VII, ADA, ADEA or concurrent charges."). The form is entitled "Charge of Discrimination." *Id.*; *see also* JA 275. The standard Privacy Act statement designed to accompany Form 5 states that the form is used to "guide [the EEOC's] mediation and investigation efforts and, as applicable, to determine, conciliate, and litigate claims of unlawful discrimination." *See* CP Enclosure with EEOC Form 5 (May 2001). It also informs charging parties that "[a] copy of th[eir] charge will ordinarily be sent to the respondent organization against which the charge is made." *Id.*

A different form, EEOC Form 283, may be used before a charge is filed to gather information about potential charges of discrimination. Form 283, designated an "intake questionnaire," expressly indicates that its "Routine Uses" are determining whether the EEOC has jurisdiction over "potential charges" and providing "pre-charge filing counseling." *See* JA 265; Pet. App. 53a. Unlike the Form 5 charge form, the Form 283 intake questionnaire does not advise that it will be sent to the employer or used for conciliation efforts. *See* JA 265; Pet. App. 53a.

II. FACTUAL BACKGROUND.

In December 2001, respondent Patricia Kennedy submitted to the EEOC an intake questionnaire, EEOC Form 283, and a five-page typed affidavit, both of which she had signed on December 3, 2001, and in which she provided information about allegations of age discrimination by her employer, FedEx. JA 265-74. The intake questionnaire did not include any indication that it constituted a charge of discrimination for purposes of the ADEA. To the contrary, as noted above, the Form 283 specified that it was not a charge by stating that its "Routine Uses" were consideration of "*potential* charges" and providing "*pre-charge filing* counseling." JA 265 (emphasis added). Nor did the EEOC treat Kennedy's intake questionnaire as a charge: the EEOC did not assign it a charge number, did not notify FedEx about it, and did not commence an investigation or conciliation efforts based on it—all steps the EEOC is required to take if it receives a charge. *See* 29 U.S.C. § 626(d); 29 C.F.R. §§ 1626.11, 1626.12.[2]

On April 30, 2002, Kennedy and thirteen other current and former FedEx employees initiated this lawsuit in the United States District Court for the Southern District of New York, alleging that FedEx had implemented policies in 1994 and 1995 that violated the ADEA. JA 19-35. The complaint did not allege that Kennedy or any of the thirteen other plaintiffs had filed a charge of discrimination or that the December 2001 intake questionnaire completed by Kennedy constituted a charge. JA 19-35.

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[2] For reasons unknown, Kennedy re-signed and re-dated the intake questionnaire on February 3, 2002. *See* JA 265.

Kennedy finally filed a charge of discrimination with the EEOC on May 30, 2002—one month after she had filed this lawsuit—using the EEOC's charge document, Form 5. JA 275.[3] It is undisputed that the May 30, 2002 charge was not timely under § 626(d). The ADEA requires that a charge be filed at least 60 days *before* litigation is commenced, in order to give the EEOC time to notify the employer of the employee's allegations and seek voluntary conciliation between the parties before a lawsuit is filed. *See* 29 U.S.C. § 626(d). But Kennedy filed her charge only *after* she filed suit, in clear contravention of the statutory requirements.

III. LOWER COURT PROCEEDINGS.

Shortly after the plaintiffs filed their complaint, FedEx moved to dismiss under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), on the grounds that none of the fourteen named plaintiffs had satisfied the statutory prerequisites to filing an ADEA action. JA 40–58.

Because the charge filed by Kennedy one month after the filing of her lawsuit was clearly untimely, the plaintiffs did not assert that it satisfied § 626(d)'s prerequisites. JA 180–92. Instead, the plaintiffs argued that Kennedy's intake questionnaire and accompanying affidavit satisfied the requirements of § 626(d), JA 190–91, even though the EEOC

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[3] Unlike Kennedy's intake questionnaire, the filing of this charge triggered the EEOC's investigative machinery: the EEOC assigned the charge a number, gave FedEx notice of it on July 9, 2002, and sought information from FedEx for its investigation of the allegations. The EEOC closed its investigation of Kennedy's charge on November 13, 2002, because "Charging Party has filed a lawsuit . . . on the same basis and issues in a court of competent jurisdiction."

had not treated the intake questionnaire as a charge by serving it on FedEx or initiating conciliation proceedings, and even though Kennedy had subsequently filed an actual charge with the EEOC, *see* JA 275. The plaintiffs neither pleaded nor presented evidence that Kennedy believed that the intake questionnaire she submitted would be treated as or otherwise constituted a charge. JA 180–277. They neither pleaded nor submitted proof that the EEOC advised Kennedy that the intake questionnaire sufficed as a charge or otherwise misled her with regard to the effect of the intake questionnaire. JA 180–277. In fact, the plaintiffs failed to plead or submit any proof that Kennedy ever discussed the intake questionnaire with any EEOC representative. JA 180–277.

The district court granted FedEx's motion to dismiss on the ground that the § 626(d) prerequisites to suit had not been satisfied. *See* Pet. App. 31a–42a. The district court held that Kennedy "failed to meet the requirement of Section 626(d)" because her charge was untimely filed "on May 30, 2002, one month after the complaint in this case was filed." *Id.* at 38a–39a. The district court rejected the plaintiffs' argument that Kennedy's submission of the intake questionnaire in December 2001 satisfied § 626(d) and, as a result, also rejected their argument that eleven other plaintiffs who had not filed their own charges could "piggyback" on Kennedy's intake questionnaire in fulfillment of their own obligations under § 626(d). *Id.*

The Second Circuit reversed in relevant part, holding that Kennedy's intake questionnaire constituted a "charge" that satisfied the requirements of § 626(d). *See* Pet. App. 4a–5a, 17a–20a. According to the Second Circuit, the intake questionnaire could be deemed a "charge" despite the fact that it was not actually treated as a charge by the EEOC, which neither notified FedEx of its filing nor commenced the

conciliation efforts required of it under § 626(d). *Id.* at 5a. What mattered, the Second Circuit held, was not whether Kennedy's filing functioned as a "charge" under § 626(d), triggering notice, investigation, and conciliation by the EEOC. *Id.* at 16a–17a. Such a rule, the court reasoned, would unfairly "establish a prerequisite to suit beyond a prospective plaintiff's control." *Id.* at 17a. Instead, what mattered to the Second Circuit was Kennedy's "manifest intent" in submitting her intake questionnaire to the EEOC. *Id.* at 15a. Applying this "manifest intent" test, the Second Circuit concluded that Kennedy's intake questionnaire constituted the charge required by § 626(d) because it contained the essential information required by EEOC regulations to be included in a charge and, through its "forceful tone and content," communicated Kennedy's "intent to activate the EEOC's administrative process"—even though this "forceful" tone, content, and intent were not communicated to FedEx. *Id.* at 17a–20a.

Finally, the Second Circuit concluded that because Kennedy's intake questionnaire satisfied the "charge" requirement of § 626(d), eleven of the other named plaintiffs could "piggyback" on that intake questionnaire without themselves having met any of the pre-suit requirements of the statute. *Id.* at 20a–21a.

FedEx timely petitioned for rehearing or rehearing *en banc*, but the Second Circuit denied that request on October 31, 2006. *See* Pet. App. 1a–2a.

This Court granted FedEx's petition for certiorari on June 4, 2007. *Federal Express Corp. v. Holowecki*, 127 S. Ct. 2914 (2007).

SUMMARY OF THE ARGUMENT

Section 626(d) of the ADEA sets forth a number of requirements that must be satisfied before a party complaining of age discrimination may sue her employer. These include, among other things, prompt EEOC notification to the employer of any charge of age discrimination against it and prompt efforts by the EEOC to eliminate the unlawful practices alleged in the charge by informal methods of conciliation, conference, and persuasion in lieu of litigation. The statute requires dismissal of any lawsuit in which these conditions have not been satisfied.

In this case, allowing Kennedy's intake questionnaire to constitute a charge permits her suit to proceed even though FedEx received no notice of that questionnaire until it was attached to the plaintiffs' opposition to FedEx's motion to dismiss and FedEx was given no opportunity to resolve Kennedy's claims prior to litigation. Permitting an ADEA suit to proceed under these circumstances is inconsistent with both the text of the ADEA and the plain intent of Congress that informal methods be undertaken to address alleged discrimination before litigation. Indeed, permitting litigation to proceed without satisfaction of the statute's requirements leads to unacceptable consequences that Congress sought to prevent and this Court should not tolerate. These consequences include increased litigation with its attendant expense and the burdens it places on litigants and the courts; more frequent pursuit of stale claims based on problems that might have been corrected with notice to the employer; and prejudice to employers attempting to defend against such claims long after records are likely to be maintained and witness recollections are likely to be fresh.

Nothing about this case warrants departing from the statutory framework that Congress set forth in the ADEA. Where, as here, Congress has struck a careful balance between vindicating employee rights and protecting the needs of employers, courts have no license to recalibrate that balance because they perceive it as somehow "unfair." Even if courts could make exceptions to the requirements of § 626(d) to avoid manifest unfairness, no such exception would be called for here. There is nothing to suggest that Kennedy would have been treated unfairly had the statutory requirements been properly enforced in her case. There is no submission of evidence—nor even an allegation—that Kennedy had any reason to believe that she had filed a charge when her intake questionnaire was submitted.

Finally, the test that the Second Circuit applied to alleviate any perceived unfairness to Kennedy is particularly problematic. It invites mischief and creates a mechanism for bypassing the statute and the EEOC. Under a test purporting to find "intent" to activate the administrative process through the "tone and content" of an intake questionnaire, the opportunistic may customize their intake questionnaires with a forceful "tone and content" yet intend only to litigate as soon as possible and never to activate the administrative process. In addition, whether any particular submission exhibits a sufficient "tone and content" is an entirely subjective determination likely to lead to different outcomes in cases involving substantially similar facts and providing no meaningful guidance to any of the affected parties. A "tone and content" test sacrifices the goals of the statute for the sake of the court's vision of "fairness." Indeed, the plaintiffs focused attention on the tone and content of Kennedy's intake questionnaire only to distract the courts from the untimeliness of the charge that she ultimately filed and the lack of informal resolution efforts in this case.

ARGUMENT

An intake questionnaire that is not treated as a charge by the EEOC—that does not trigger notice and conciliation efforts by the agency—can never constitute the "charge" that must be filed under the ADEA. The statutory scheme makes clear that to constitute a "charge," an intake questionnaire must allege unlawful discrimination and activate the EEOC's mandatory duties of providing notice and initiating conciliation. An intake questionnaire that does not yield notice and attempts at informal resolution cannot be a "charge." Application of this straightforward rule in this case is required by the plain language of § 626(d), is consistent with Congress' evident intent in enacting that provision, and results in no unfairness.

I. A "CHARGE" WITHIN THE MEANING OF § 626(d) IS A DOCUMENT THAT RESULTS IN NOTICE AND AN OPPORTUNITY FOR CONCILIATION.

The plain text of § 626(d) makes clear that a "charge" is a document that triggers the EEOC's mandatory duties of providing notice and initiating conciliation.[4] That reading is affirmed by both the legislative history of the ADEA and sound public policy considerations.

A. The ADEA defines a "charge" by what it does.

Section 626(d), which requires a "charge" to be filed before an ADEA lawsuit may be initiated, also straightforwardly defines "charge." A "charge" alleges

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[4] Unlike an intake questionnaire, this is precisely the design and function of a Form 5 "Charge of Discrimination."

unlawful discrimination and initiates the EEOC's notice and conciliation process based on the allegations it contains. 29 U.S.C. § 626(d). If the EEOC receives a charge, it *must* "promptly notify all persons named in such charge as prospective defendants in the action and . . . promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion." *Id.* Thus, a document that triggers the EEOC's mandatory statutory duties is a charge for purposes of § 626(d); a document that does not is not.

In light of § 626(d)'s plain, functional definition of a "charge," the Second Circuit erred in holding that Kennedy's intake questionnaire constituted a charge. Kennedy's intake questionnaire undisputedly failed to activate the EEOC's investigatory machinery. The EEOC did not assign the questionnaire a charge number. It did not notify FedEx of Kennedy's allegations. And it did not commence an investigation or efforts to resolve Kennedy's claims informally. As such, Kennedy's intake questionnaire plainly failed to meet § 626(d)'s definition of a "charge."

B. Congress intended employers to have notice of discrimination allegations and an opportunity to conciliate claims before facing suit under the ADEA.

As demonstrated above, the text of the ADEA clearly defines "charge" as a document that initiates the EEOC's notice and conciliation process. Because the text of the statute is plain, no further analysis is required in this case. *See, e.g.*, *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 127 S. Ct. 1534, 1549 (2007) ("[W]hen the intent of Congress is clear from the statutory text, that is the end of the matter.") (marks omitted). Even if there were any doubt on this score,

however, it would be resolved by the manifest congressional purpose behind § 626(d), which is to facilitate and require notice and conciliation. Because this Court's "obligation is to give effect to congressional purpose so long as the congressional language does not itself bar that result," *Johnson v. United States*, 529 U.S. 694, 710 n.10 (2000), it should therefore hold that the prerequisites of § 626(d) are not satisfied by an intake questionnaire that has not resulted in notice and the initiation of conciliation proceedings.

The ADEA reflects Congress' careful balance between the need of employees to have an effective remedy for age discrimination and the competing need of employers to have an opportunity to resolve employee issues without ligitation. *See* 113 Cong. Rec. S31254 (daily ed. Nov. 6, 1967) (remarks of Sen. Javits), *reprinted in* U.S. Equal Employment Opportunity Comm'n, Legislative History of the Age Discrimination in Employment Act (1981) (hereinafter "Legislative History of the ADEA"), Doc. No. 20 at 145 ("We now have the enforcement plan which I think is best adapted to carry out this age-discrimination-in-employment ban with the least overanxiety or difficulty on the part of American business, and with complete fairness to the workers."); 113 Cong. Rec. H34746 (daily ed. Dec. 4, 1967) (remarks of Rep. Daniels), *reprinted in* Legislative History of the ADEA, Doc. No. 21 at 157 ("The point should be made, however, that the bill takes into full consideration the problems and interests of employers . . . . It recognizes the needs of both employees and employers.").

Congress recognized that a private lawsuit is often a less-than-ideal way to address alleged age discrimination for everyone involved—the employee, the employer, and the courts. Instead, "the prompt resolution of employment discrimination allegations through voluntary conciliation and

cooperation," *Ledbetter v. White*, 127 S. Ct. 2162, 2170–71 (2007), is vastly preferable. *See* 113 Cong. Rec. H34745 (daily ed. Dec. 4, 1967) (remarks of Rep. Reid), *reprinted in* Legislative History of the ADEA, Doc. 21 at 156 ("Rather than utilizing enforcement procedures patterned after the National Labor Relations Act, H.R. 13045 adopted the recommendation of our bill to follow essentially the well-tested compliance mechanisms of the Fair Labor Standards Act. This approach emphasizes conciliation[,] conference and persuasion . . . ."); 113 Cong. Rec. H34742 (daily ed. Dec. 4, 1967) (remarks of Rep. Perkins), *reprinted in* Legislative History of the ADEA, Doc. No. 21 at 153 (noting with favor that, under Wisconsin's age discrimination law, "[a]lmost all cases have been settled by conciliation"); *see also* 123 Cong. Rec. S34317 (daily ed. Oct. 19, 1977) (remarks of Sen. Domenici), *reprinted in* Legislative History of the ADEA, Doc. 47 at 504 ("[I]t is desirable for all concerned—the employees, the employers, and the [EEOC] to resolve as many cases as possible by means of voluntary compliance."). Congress also recognized the importance of giving an employer notice of allegations of age discrimination before a lawsuit is brought, both to aid voluntary conciliation efforts and as a matter of fairness to the employer. *See* 29 U.S.C. § 626(d) (providing for such notice to employers).

Congress balanced these competing considerations—an employer's need for notice of the allegations against it and the preference for voluntary conciliation versus an aggrieved employee's need for a vehicle to obtain relief—by designing the ADEA to require that notice will be given to employers and informal resolution will be sought before litigation is instituted. Thus, under the ADEA, "[t]he employee as well as the [EEOC] may bring violators to court but the [EEOC] *must first attempt to procure voluntary compliance before either [the EEOC] or the employee files a civil action.*" 113

Cong. Rec. H34740 (daily ed. Dec. 4, 1967) (remarks of Rep. Perkins) (emphasis added), *reprinted in* Legislative History of the ADEA, Doc. 21 at 151; *see also* S. Rep. 90-723, at 10 (1967), *reprinted in* Legislative History of the ADEA, Doc. 18 at 114 ("During the 60-day period, the [EEOC] *must* seek to eliminate unlawful practices by informal methods of conciliation.") (emphasis added).

Congress' intent, as demonstrated in this legislative history, together with the functional design of the statute, make manifest the requirement that notice and conciliation attempts occur prior to the filing of an ADEA lawsuit. Congress' intent is thwarted where, as in this case, an employee is permitted to bring suit even though she has not filed a timely charge with the EEOC, her employer has not received pre-suit notice of her allegations, and there have been no efforts at resolving her claims without resort to litigation. Therefore, to give effect to the congressional purpose for the statute, this Court must hold that § 626(d)'s prerequisites to bringing an ADEA lawsuit are not satisfied by the submission of an intake questionnaire that has not triggered the EEOC's mandatory duties of giving notice to the employer and initiating voluntary reconciliation efforts.

C. Sound policy requires notice and conciliation to occur before suit is brought under the ADEA.

The requirement that notice and conciliation occur before an ADEA lawsuit is filed—and the resulting conclusion that an intake questionnaire that is not treated as a charge by the EEOC is not a charge—reflects sound public policy. A contrary conclusion would lead to numerous unpalatable consequences that Congress did not intend.

1. Increased Litigation.

Allowing intake questionnaires to satisfy § 626(d) even where conciliation efforts have not occurred would lead to increased, perhaps unnecessary, litigation. If efforts by the EEOC to "eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion" do not take place, more claims of age discrimination will result in lawsuits. The EEOC reports that it has successfully conciliated between 74 and 409 ADEA charges each year since 1997 in addition to the charges that were "resolved through negotiated settlements, withdrawals with benefits, and other types of resolutions." *See* U.S. Equal Employment Opportunity Comm'n, Age Discrimination in Employment Act (ADEA) Charges FY 1997-FY 2006, http://www.eeoc.gov/stats/adea.html (last visited August 7, 2007); U.S. Equal Employment Opportunity Comm'n, Definitions of Terms, http://www.eeoc.gov/stats/define.html (last visited August 7, 2007). Without the EEOC's intervention, many of these informally-resolved claims undoubtedly would have resulted in lawsuits.

Resolution of ADEA claims through litigation rather than conciliation is bad for employees, who are forced to wait longer for their allegations to be resolved and to incur the expense and stress of suing their employer. *See* 113 Cong. Rec. S7076 (daily ed. Mar. 16, 1967) (remarks of Sen. Javits), *reprinted in* Legislative History of the ADEA, Doc. 15 at 71 (lengthy proceedings are particularly prejudicial to the rights "of older citizens to whom, by definition, relatively few productive years are left"); Richard A. Bales, Compulsory Arbitration of Employment Claims: A Practical Guide to Designing and Implementing Enforceable Agreements, 47 Baylor L. Rev. 591, 593 (1995) ("Judges see the employment litigation explosion adding to the backlog that

forces litigants to wait for years before getting to trial . . . .").

Unnecessary litigation harms employers, who face the distractions and expenses of defending themselves against allegations of discrimination in court. Employers are significantly penalized if they are deprived of the opportunity to resolve claims without litigation because, once suit is filed, they incur attorneys' fees and additional costs of litigation—including potentially irreversible harm to their reputation—and they may become liable for the employee's attorneys' fees as well. *See Whittington v. Nordam Group, Inc.*, 429 F.3d 986, 1001 (10th Cir. 2005) ("Attorney fees may be awarded to the prevailing party in age-discrimination cases through the ADEA's incorporation of remedies available under the Fair Labor Standards Act.").

Increased litigation of ADEA claims also burdens courts, which have to devote more of their limited resources to resolving these disputes. *See United States v. Dieter*, 429 U.S. 6, 8 (1976) (noting that the Court must be "wary of imposing added and unnecessary burdens on the courts of appeals"); *Emerald Investors Trust v. Gaunt Parsippany Partners*, Nos. 05-3706, 05-4134, __ F.3d __, 2007 WL 1695342, at *10 (3d Cir. June 13, 2007) (noting the "burdens on the federal courts" caused by the "massive increase in the quantity of litigation in the federal courts for the last 30 years, far outpacing the growth in the size of the federal judiciary").

Congress expressly required the EEOC to attempt conciliation between the parties, evidencing a clear public policy of avoiding the costs and burdens of litigation where possible. "The advantages of resorting in the first instance to a procedure whereby disputes may be resolved by conference, conciliation, and persuasion are evident: an unrepresented

claimant may seek and sometimes be awarded relief; the parties may informally resolve their differences without the bitterness engendered by litigation; and the courts are spared the additional burden of yet more lawsuits." *Davis v. U.S. Steel Supply*, 688 F.2d 166, 193 (3d Cir. 1982) (Sloviter, J., dissenting). This Court should enforce the clear language of § 626(d) to achieve these effects.

2. Stale claims.

Permitting § 626(d) to be satisfied by an intake questionnaire where notice and conciliation efforts have not taken place would increase not only the number of ADEA lawsuits but also the likelihood that the claims alleged in those lawsuits will be stale.

An employee is required to bring suit under the ADEA within ninety days of receiving notice that the EEOC proceedings involving her claims have been dismissed or terminated. *See* 29 U.S.C. § 626(e). If the EEOC delays in issuing a notice of dismissal, however, the employee may delay in bringing her suit. *See* Howard Eglit, The Age Discrimination in Employment Act, Title VII, and the Civil Rights Act of 1991: Three Acts and a Dog That Didn't Bark, 39 Wayne L. Rev. 1093, 1108 (1993) (under the ADEA as amended, "a notice issued long after the alleged discrimination occurred and after the filing of a charge of unlawful discrimination—years even—will only then start the 90-day 'meter' running. And so long as the suit is filed within that 90 days, the plaintiff will be deemed to have timely commenced his or her litigation."). If the EEOC never issues a notice of dismissal, the ninety-day "meter" never starts running and the employee can wait indefinitely—even

five, ten or twenty years or more after the claims arose—to bring suit.[5]

The problem of stale claims is exacerbated if an employee is allowed to bring suit after submitting an intake questionnaire where no notice has been given to the employer and no attempts at voluntary conciliation have been made. Such a rule increases the likelihood of stale claims being litigated because if the EEOC has not provided notice and initiated conciliation attempts, it has no reason to issue a notice of dismissal. Allowing suits to be brought based on intake questionnaires that have not been treated as charges will result in more suits being brought where no notice of dismissal has issued, and those suits are more likely to be stale because there is no time limit within which they must be brought.

Stale suits prejudice employers because "the passage of time may seriously diminish the ability of the parties and the factfinder to reconstruct what actually happened." *Ledbetter v. White*, 127 S. Ct. 2162, 2171; *see also id.* at 2170 (congressionally-established deadlines for filing charges of discrimination are intended to "protect[] employers from the burden of defending claims arising from employment decisions that are long past."). Witnesses may be unavailable because they have moved, or died, or for a variety of other

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[5] Unlike in the Title VII and the Americans with Disabilities Act contexts, receipt of a notice of dismissal is not a condition precedent to bringing suit under the ADEA. *Compare* 29 U.S.C. § 626(d), (e) (ADEA) *with* 42 U.S.C. § 2000e-5(f)(1) (Title VII) *and* 42 U.S.C. § 12117(a) (ADA); *see also Julian v. City of Houston*, 314 F.3d 721, 725 & n.8 (5th Cir. 2002). Thus, the lack of a letter of dismissal does not prevent an employee from suing under the ADEA, but instead exempts her from any time limit on doing so.

reasons. Even those witnesses who can be found will have diminished recollections. *See id.* ("[E]vidence relating to intent may fade quickly with time."); *Smith v. Hooey*, 393 U.S. 374, 380 (1969) (noting the "erosive effects of the passage of time": "evidence and witnesses disappear, memories fade, and events lose their perspective"). And the pertinent employment records may be difficult to locate or even non-existent, perhaps because the employer, having never received notice of the employee's allegations, destroyed them under a reasonable records retention policy. *See* 29 C.F.R. § 1627.3 (employers must keep payroll or other employee records for only three years unless they receive notice that an enforcement action is commenced, in which case they are required to keep the pertinent records until the final disposition of the action).

Moreover, stale suits not preceded by notice and EEOC action deprive employers of the opportunity to detect and correct potentially discriminatory employment practices in a timely and efficient manner, thus undercutting the ADEA's primary goal of preventing unlawful discrimination. *See* 113 Cong. Rec. H34745 (daily ed. Dec. 4, 1967) (remarks of Rep. Eilberg), *reprinted in* Legislative History of the ADEA, Doc. 21 at 156 ("[T]he bill contains very real and effective tools with which to launch new educational and persuasive programs designed to eradicate discriminatory practices in employment. And, where these tools fail, the bill provides machinery to enable governments and agencies to *prevent* practices which cannot be otherwise overturned.") (emphasis added); *Zinger v. Blanchette*, 549 F.2d 901, 905 (3d Cir. 1977) ("The primary purpose of the [ADEA] is to *prevent* age

discrimination in hiring and discharging workers.") (emphasis added).[6] Congress did not intend these undesirable results.

On the other hand, requiring the EEOC to treat a document as a charge in order for that document to be deemed a "charge" under § 626(d) encourages the EEOC to initiate proceedings and issue prompt notices of dismissal, as required by the statute. The ninety-day limitation on suing, which runs from the date of the notice of dismissal, prevents the litigation of stale age discrimination claims and ensures that employers are not blindsided with stale claims of which they never received any notice.

3. Effect on the EEOC.

Finally, allowing intake questionnaires to suffice as charges under § 626(d) will either: (1) force the EEOC to dramatically increase its workload; or (2) allow plaintiffs to unilaterally bypass the important statutory obligations Congress has assigned to the EEOC. Congress did not intend either of these outcomes.

Because the EEOC did not intend the Form 283 intake questionnaire to function as a charge, the EEOC does not generally treat intake questionnaires as charges. *See Bost v. Federal Express Corp.*, 372 F.3d 1233, 1240–41 (11th Cir. 2004) (EEOC did not give employer notice of intake questionnaire and did not initiate investigation or conciliation efforts); *Diez v. Minn. Mining & Mfg. Co.*, 88 F.3d 672, 674

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[6] This particular effect could be mitigated somewhat if the EEOC were required to at least provide the prompt notice to employers that § 626(d) requires, but is better avoided if the EEOC also acts quickly to process allegations toward informal resolution.

(8th Cir. 1996) (same); *Downes v. Volkswagen of Am., Inc.*, 41 F.3d 1132, 1137 (7th Cir. 1994) (same); *Steffen v. Meridian Life Ins. Co.*, 859 F.2d 534, 542–43 (7th Cir. 1988) (same); *Casavantes v. Cal. State Univ.*, 732 F.2d 1441, 1443 n.2 (9th Cir. 1984) (same).

If intake questionnaires do constitute § 626(d) "charges," then the EEOC is required, by the ADEA and its own regulations, to provide notice to employers and to effectuate conciliation efforts promptly upon receiving such documents. *See* 29 U.S.C. § 626(d); 29 C.F.R. §§ 1626.11, 1626.12. Since 1997, the EEOC has processed between 75,000 and 80,000 charges per year, which, one may surmise, is a small fraction of the number of completed intake questionnaires and other inquiries the agency receives each year. *See* U.S. Equal Employment Opportunity Comm'n, Charge Statistics FY 1997 through FY 2006, http://www.eeoc.gov/stats/charges.html (last visited August 7, 2007).[7] If every intake questionnaire suffices as a charge and triggers its investigative machinery, the EEOC's workload will increase significantly.[8]

On the other hand, if the EEOC does not treat an intake questionnaire as a charge, but that document is nevertheless held to satisfy § 626(d)'s charge requirement, the EEOC's congressionally mandated duties are, in effect, nullified. As

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[7] The EEOC does not report on its website the number of completed intake questionnaires it receives annually.

[8] The Second Circuit's "manifest intent" standard would present its own problems for the EEOC. Under that standard, the EEOC presumably would be required to scrutinize the thousands of intake questionnaires it receives in an attempt to determine which ones exhibit sufficient "forcefulness" to constitute a "charge" and trigger its statutory obligations under § 626(d).

previously discussed, the EEOC is required to promptly do two things when it receives a charge: it *shall* provide notice to the employer and it *shall* seek to eliminate the alleged discrimination informally. 29 U.S.C. § 626(d); 29 C.F.R. §§ 1626.11, 1626.12. If the EEOC is not required to treat all intake questionnaires as charges, but employees are nevertheless permitted to bring suit after having merely submitted an intake questionnaire, then plaintiffs (and their lawyers) may unilaterally bypass the statutory requirements simply by submitting a completed intake questionnaire, rather than a charge, and then bringing suit sixty days later.[9]

Congress structured the ADEA so that the EEOC will play a significant role in preventing and resolving claims of age discrimination. *See* 29 U.S.C. § 626(b), (d). Allowing suit to be brought without regard to whether the EEOC treated an intake questionnaire as a charge perverts that structure and makes the EEOC nothing more than a mere base to touch on one's way to the courthouse.[10]

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[9] In fact, that is what happened in this case. The EEOC never completed its conciliatory efforts and investigation of Kennedy's charge because Kennedy had "filed a lawsuit . . . on the same basis and issues in a court of competent jurisdiction" before the EEOC could do its job. *See supra* note 3.

[10] FedEx's petition for certiorari alluded to the ripple effects of disregarding the requirements of notice and conciliation efforts resulting from the principle of "piggybacking." *See, e.g.*, Pet. 4-5, 27. Under this principle, "where one plaintiff has filed a timely EEOC complaint, other non-filing plaintiffs may join in the action if their individual claims arise out of similar discriminatory treatment in the same time frame" and the filed charge "provides some indication that the grievance affects a group of individuals defined broadly enough to include those who seek to piggyback on

II. NOTHING ABOUT THIS CASE WARRANTS DEPARTURE FROM § 626(d).

As shown above, the ADEA clearly requires that, in order to constitute a "charge" under § 626(d), a document must activate the EEOC's notice and conciliation processes. That is the end of the matter. Where Congress has spoken, it is not for the courts to create their own different rules. But even if it were appropriate for a court to bypass the requirements of § 626(d) in the interest of fairness, there would be no grounds for doing so here. Respondent Kennedy had no reason to believe that she had filed the requisite "charge" when she submitted her intake questionnaire, and there is no unfairness in holding her to the terms of the statute.

A. It is improper to disregard the statute based on perceived "unfairness" to the employee.

Notwithstanding a plain statutory scheme requiring that a "charge" result in notice and conciliation efforts, the Second Circuit held that Kennedy's intake questionnaire, which did not result in notice and conciliation efforts, nevertheless constituted a "charge" under § 626(d). Pet. App. 5a, 20a. The Second Circuit overrode the statute's functional definition of "charge" because it felt that it would be unfair to "establish a prerequisite to suit beyond the plaintiff's control." *Id.* at 17a. To avoid that perceived unfairness, the Second Circuit instead applied its "manifest intent" test and held that Kennedy's intake questionnaire was a charge simply because,

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the claim." *See* Pet. App. 11a (marks omitted). All of the problems identified here are magnified when non-filing plaintiffs are permitted to piggyback on an intake questionnaire that did not itself satisfy § 626(d).

in the court's view, its "forceful tone and content" somehow "communicated Kennedy's intent to activate the EEOC's administrative process." *Id.* at 19a–20a.

The Second Circuit's ruling impermissibly disregarded the terms of the statute. "It is the duty of courts to interpret the[] laws [passed by Congress] and apply them in such a way that the congressional purpose is realized." *Merrell Dow Pharms. Inc. v. Thompson*, 478 U.S. 804, 828 (1986). Allowing a lawsuit to proceed where no timely charge has been filed and no notice or conciliation efforts have taken place violates, rather than effectuates, Congress' purpose—even when doing so is based on a court's perception of "fairness." Doing so ignores the countervailing unfairness and inefficiencies caused by depriving employers of pre-suit notice and the opportunity to resolve the issue before litigation is commenced. It is neither the lower courts' nor this Court's "prerogative to change the ways in which [the ADEA] balances the interests of aggrieved employees against the interest in encouraging" voluntary conciliation between the parties and providing employers with pre-suit notice of the allegations against them. *See Ledbetter v. White*, 127 S. Ct. 2162, 2177 (2007). Instead, as this Court has recently reaffirmed, courts must be "[r]espectful of the legislative process that crafted this [statutory] scheme [and] must give effect to the statute as enacted." *Id.* at 2170 (marks omitted); *see also Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980) ("We must respect the compromise embodied in the words chosen by Congress. It is not our place simply to alter the balance struck by Congress in procedural statutes by favoring one side or the other in matters of statutory construction.").

In this case, giving effect to § 626(d) as enacted means requiring notice to the employer and attempts at conciliation before an intake questionnaire can suffice as the charge

required by § 626(d). Any change to this statutory framework must come from the legislature, not the judiciary. *See Texaco Inc. v. Hasbrouck*, 496 U.S. 543, 568 n.27 (1990) ("[W]e have a duty to be faithful to congressional intent when interpreting statutes and are not free to consider whether, or how, the statute should be rewritten."); *cf. United States v. Mezzanatto*, 513 U.S. 196, 216 n.1 (1995) ("The Court's obligation is to interpret criminal procedure and evidentiary rules according to congressional intent. If the Government believes that the better rule is different from what is currently the law, the Government can petition Congress to change it.").

"Congress has not been shy in revising other judicial constructions of the ADEA," *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 594 n.7 (2004), and Congress will undoubtedly do so here if it believes a change to § 626(d) is warranted. Until then, the courts should enforce § 626(d) as written and effectuate Congress' plain intent by requiring that a "charge" result in EEOC notice to the employer and attempts at voluntary conciliation.

B. <u>There was no unfairness to the employee in this case.</u>

The ADEA leaves no room for courts to excuse the notice and conciliation prerequisites of § 626(d). Even if an exception to § 626(d) could be crafted, however, none was appropriate here, where proper application of the statute would result in no unfairness to the employee.

Some lower courts have attempted to justify a limited exception to the requirements of § 626(d) where the EEOC misled a hapless employee into believing that the intake questionnaire she submitted was a charge or would be treated

as a charge. Here, however, there is neither an allegation nor was there a presentation of evidence that the EEOC misinformed Kennedy about the status of her charge or suggested in any way that her intake questionnaire was sufficient to satisfy her obligations under § 626(d).[11] In fact, Kennedy has not even alleged, much less shown any evidence, that she actually thought her intake questionnaire sufficed as the charge required by § 626(d). On the contrary, the evidence shows that Kennedy could not have reasonably believed that her intake questionnaire would be treated or sufficed as a charge. Kennedy submitted a two-page Form 283, which expressly noted that it would be used for pre-charge purposes, JA 265, as well as a five-page affidavit that appears to have been drafted with assistance from a lawyer, JA 266-74. In addition, Kennedy eventually filed a charge of discrimination with the EEOC—a strong indication that she did not believe that her earlier intake questionnaire sufficed as the charge required by § 626(d). JA 275; *see Bost v. Federal Express Corp.*, 372 F.3d 1233, 1241 (11th Cir. 2005) ("If Bost believed that he had filed a charge of discrimination

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[11] That fact distinguishes this case from cases like *Steffen v. Meridian Life Ins. Co.*, 859 F.2d 534 (7th Cir. 1988), where communications from the EEOC misled an employee. *See id.* at 544 ("The problem in this case is that the EEOC informed Steffen that it would be treating the Intake Questionnaire as a charge but then failed to treat it as a charge."). Given the clear statutory scheme requiring a "charge" to result in notice and conciliation, the *Steffen* court's holding that the plaintiff's intake questionnaire satisfied § 626(d) even though it did not result in notice and conciliation was inappropriate. If some exception from the statutory requirements were to be permitted based on fairness concerns, however, it should only be in cases like *Steffen*, where there has been a demonstration of reasonable reliance on misleading communications from the EEOC.

when he filed the intake questionnaire, he would not have filed an additional timely charge of discrimination."); *Diez v. Minn. Mining & Mfg. Co.*, 88 F.3d 672, 677 (8th Cir. 1996).

Nor is this a case where, if Kennedy's intake questionnaire were not considered a "charge," she would have been foreclosed from bringing an ADEA suit altogether. On May 30, 2002, Kennedy filed a charge of age discrimination with the EEOC. JA 275. That charge initiated the EEOC's investigatory machinery, as required by § 626(d). Thus, had Kennedy simply waited to file her ADEA lawsuit until sixty days after May 30, as § 626(d) required, she would have satisfied the prerequisites of § 626(d) and been permitted to proceed with her lawsuit just as Congress intended. Instead, however, Kennedy sued first and filed her charge second, in clear violation of § 626(d). As a result, FedEx was deprived of pre-suit notice of Kennedy's allegations and any opportunity to resolve Kennedy's claims without litigation. Although Kennedy's charge initially activated the EEOC's investigatory machinery, her premature lawsuit caused the EEOC to abort its statutory functions before completing them. *See supra* note 3.[12]

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[12] The EEOC routinely treats completed Form 5 "Charges of Discrimination" as charges, unlike intake questionnaires. Thus, simply using the correct form before filing suit is overwhelmingly likely to forestall all of the problems created by the misuse of the intake questionnaire in this case. In any event, any issue regarding the status of a rare Form 5 that is not acted upon by the EEOC is left for another day because the EEOC acted on Kennedy's Form 5 by giving notice of the charge to FedEx. The EEOC was foreclosed from fulfilling its other statutory duty of attempting to resolve Kennedy's claims without litigation by Kennedy's premature lawsuit.

While the Second Circuit purported to base its conclusion below on concerns about "unfairness" to plaintiffs, the facts show that the real unfairness in this case was to FedEx. Kennedy was permitted to avoid the consequences of her own impatience at FedEx's expense. Rather than holding Kennedy accountable for her failure to follow the ADEA's command to file a charge and then wait sixty days before suing, the Second Circuit instead dispensed with FedEx's statutory right to receive pre-suit notice of Kennedy's claims and an opportunity to resolve those claims informally. Fundamentally, the Second Circuit rejected Congress' balancing in the ADEA of the competing interests between employees and employers, and presumptuously substituted its own preference. Such an unprincipled decision could not possibly have been intended by Congress—and should not be countenanced by this Court.

C. The "manifest intent" test applied by the Second Circuit is an invitation for mischief and otherwise too unclear to be workable.

Even if concerns about perceived unfairness could in some circumstances be grounds for departing from the strictures of § 626(d), the Second Circuit's "manifest intent" test would be entirely unsuitable for identifying such circumstances. Its "manifest intent" test both invites mischief by the opportunistic who want to avoid the administrative process and creates uncertainty for all litigants and the EEOC.

Under the Second Circuit's "manifest intent" test, any document that contains the minimum content required by the EEOC's interpreting regulations and "demonstrates a party's intent to activate the EEOC's administrative process" constitutes a charge. Pet. App. 16a. Whether the document communicates such an intent is determined by reference to the

"tone and content" of the document. *See* Pet. App. 19a. Absolutely no evidence of the employee's belief—reasonable or otherwise—that the document would in fact satisfy the statutory requirements is necessary. Nor is any other evidence of some "unfairness" that would result from enforcement of the statutory requirement that a "charge" activate the EEOC's notice and conciliation processes required.

Under the Second Circuit's test, an intake questionnaire with a forceful enough "tone" would suffice as a charge even if the employee *knew* that the document would not be treated as a charge and intentionally filed it, rather than a charge, for the very purpose of bypassing notice and conciliation requirements and proceeding straight to litigation. This opportunity for mischief is only enhanced when an employee is represented by counsel. A clever attorney wishing to avoid the inconvenience of exhausting administrative remedies could easily do so simply by having his client complete an intake questionnaire, which is generally not treated as a charge, rather than a Form 5.

Such a test, which permits an employee (or her attorney) to purposefully evade the congressionally-established framework for reducing and resolving claims of age discrimination, should not be tolerated by this Court. If an employee wants an intake questionnaire that fails to fulfill the functions of a charge nevertheless to suffice as a charge, she should, at the very least, be required to show—through evidence that the EEOC misled her or otherwise—that she reasonably believed that the document she submitted would be noticed to the employer and would result in informal resolution efforts. Otherwise, intake questionnaires can be used to render Congress' statutory scheme a dead letter and the EEOC defunct (unless, of course, the EEOC takes the

opposite tack and consumes its resources providing notice and conciliating every time an intake questionnaire is submitted).

In addition, the Second Circuit's highly subjective "manifest intent" test, with its focus on "tone and content," is wholly unworkable even when not used deliberately as a mechanism to bypass § 626(d). Whether any particular submission exhibits a sufficient "tone and content" is an entirely subjective determination likely to lead to different outcomes in cases involving substantially similar facts. *Compare, e.g., Bost v. Federal Express Corp.*, 372 F.3d 1233, 1241 (11th Cir. 2004) *with* Pet. App. 3a-23a. Under the Second Circuit's standard, a potential plaintiff who files an intake questionnaire will have no way of knowing in advance whether he has exhibited a sufficiently "forceful" tone to have met the statutory requirement for a charge. Nor will an employer that (unlike FedEx here) learns of the submission of an intake questionnaire know whether that document constitutes a "charge" subjecting it to suit under the ADEA—at least, not until a court analyzes the "tone and content" of the intake questionnaire. Even the EEOC, as discussed *supra* note 8, will be left to analyze the "tone" of every intake questionnaire it receives to determine whether it is actually a "charge" that triggers its notice and conciliation obligations. The statutory scheme carefully designed by Congress simply cannot function unless all of the relevant parties are given much clearer guidance as to what constitutes a "charge" than is available under the Second Circuit's "manifest intent" standard.

CONCLUSION

For the foregoing reasons, the Second Circuit's decision should be reversed with instructions to affirm the district court's decision dismissing the claims of Kennedy and those

respondents attempting to piggyback on Kennedy's intake questionnaire.

Respectfully Submitted,

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